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No. 93-1108

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NED R. McWHERTER, Governor of Tennessee, *et al.*,

Appellants,

v.

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether, in a vote dilution challenge to a statewide legislative redistricting plan under Section 2 of the Voting Rights Act, statewide demographic percentages are the proper measure of undiluted minority voting strength where: (i) appellees challenged the entire plan; (ii) the evidence of unequal access was statewide; (iii) the three-judge court made statewide findings of vote dilution; and (iv) the use of area demographic percentages would not affect the outcome of the case?

2. Whether the finding of the court below that plaintiff-appellees' proposed black-majority districts in rural west Tennessee are compact is properly before the Court, and if so, whether the finding is clearly erroneous?

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MOTION TO DISMISS OR AFFIRM

Appellees in the above entitled case move to dismiss or affirm on the grounds that the appeal is based upon speculative contingencies and that the questions presented are so unsubstantial as not to need further argument.[1]

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1. Although appellees contend that the three-judge court should have used total rather than voting age population in its analysis and have filed a notice of cross appeal, that issue is not involved in this appeal. Jurisdictional Statement ("J.S."), Questions Presented at (i).

STATEMENT OF FACTS

The statement of facts as presented by appellants is incorrect and misleading, and requires correction.

Appellees, plaintiffs below, are the Rural West Tennessee African-American Affairs Council, Inc. ("RWTAAAC"), a non-profit corporation in Tennessee whose purpose is to promote voter registration, education, and participation,[2] and eight African-American residents and registered voters of Tennessee. Appellees contended in the court below that the 1992 redistricting for the Tennessee State Senate diluted minority voting strength in violation of the Constitution of the United States and Section 2 of the Voting Rights Act, 42 U.S.C. §1973. Following a trial on the merits, the three-judge district court ruled on November 4, 1993, that "under the totality of the circumstances the 1992 Senate reapportionment plan violates Section 2." Jurisdictional Statement Appendix ("J.S. App.") 28a.

Appellants contend that "[t]he statutory claim — decided by the district court and at issue in this Court — was that the Senate Plan dilutes the votes of African-Americans in seven counties in southwest Tennessee in violation of Section 2 of the Voting Rights Act," and that "appellees' vote-dilution evidence . . . was limited to southwest Tennessee." J.S. 3-4. The contentions that the litigation was limited to one area of the state are flatly contradicted by the evidence in this case, as well as the findings of the three-judge court.

In their complaint, appellees charged that "[t]he newly enacted legislative districts *in Tennessee* dilute the voting strength of African-Americans." Complaint, para. 23 (emphasis added). Further, the three-judge court found that

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2. There are no parent companies or subsidiaries of RWTAAAC. The Memphis Branch NAACP intervened in this action, but is not a party to this appeal.

appellees challenged "Tennessee's 1992 apportionment of its 33 state Senate districts." J.S. App. 2a; *see also* J.S. App. 18a-19a ("what is really at issue, is the entire plan . . . whether the minority within the applicable jurisdiction, in this case the state, suffers from vote dilution"). Thus, it is clear that appellees' claim, and the issue decided by the three-judge court, was not limited to vote dilution in the seven counties in southwest Tennessee, but went to the "results" under Section 2 of the entire senate redistricting plan.

It is equally clear that appellees' evidence of vote dilution was not limited to southwest Tennessee. Although appellees focused on southwest Tennessee because that was the area of the state in which additional majority-black districts could be drawn, they alleged in their complaint, Complaint, para. 20, a *statewide* pattern of discrimination against blacks, including discrimination in voting. And at trial, appellees introduced substantial evidence in support of their statewide allegations. *See, e.g.*, Pl. Ex. 11, Plaintiffs' First Request for Judicial Notice as to Law and Judicial Decisions; *see also* Pl. Exs. 50-56, 69.[3]

Based upon the evidence presented at trial, the three-judge court made statewide findings of fact where relevant. The court held that "based upon the evidence presented at trial, we find that the lack of black electoral success *in Tennessee* is a factor which weighs in favor of a finding of vote dilution." J.S. App. 18a (emphasis added). According to the court, "[w]e agree . . . with the plaintiffs' position that the proper scope of our review

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3. Pl. Ex. 11 was a compilation of laws and judicial decisions, many of which were of statewide application. Pl. Ex. 50 showed voting, election, poll tax, population, political party, and black population statistics for the state as a whole. Pl. Ex. 56, a report of the U.S. Commission on Civil Rights, showed black office holders throughout the state as of February 1, 1968. Other exhibits showed statewide census data by race, voter registration, and state requirements for registration and voting.

is the entire state." *Id.* Taking into account statewide voting patterns and cohesion, the court found that "no black from a majority-white district has won a seat in the state Senate this century," J.S. App. 20a, and that under the challenged plan, "blacks can expect to hold 9.1% of the Senate seats, the same percentage blacks now hold." *Id.* The court concluded that "the level of black electoral success in the state Senate indicates that the Senate reapportionment plan will result in minority vote dilution." *Id.* Thus, appellants' claim that the district court "found" vote dilution only as to southwest Tennessee, J.S. 4, is incorrect.

The three-judge court made other findings showing vote dilution outside southwest Tennessee and that blacks are politically cohesive on a statewide basis. The court found that "Tennessee has a long history of official racial discrimination in voting. Although the worst discrimination is in the past, effects of past discrimination are still apparent." J.S. App. 14a. Slavery was "officially sanctioned" throughout the state prior to the Civil War. J.S. App. 15a. In 1834 the state Constitution was amended to deny the right to vote even to free black men. *Id.* Following Reconstruction and the advent of Jim Crow, blacks were again effectively disfranchised on a statewide basis in Tennessee. *Id.* The state legislature passed laws in 1889 and 1890 "requiring voter registration; separate ballot boxes for local, state and national elections; single, nonpartisan ballots; and a poll tax. These laws had the primary purpose and effect of reducing black political participation." *Id.*[4]

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4. Such evidence on which the court based its findings is the kind lower courts have traditionally relied upon to prove racial bloc voting and political cohesion. *See, Nevett* v. *Sides*, 571 F.2d 209, 223 n.18 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980) (racial bloc voting may be shown by, among other things, "the 'existence of past discrimination in general,'") (*quoting Zimmer* v. *McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973), *aff'd*, 424 U.S. 636 (1976)); *United States* v. *Marengo County Commission*, 731 F.2d 1546, 1567 n.34 (11th Cir.), *cert. denied*, 469 U.S. 976 (1984); *League of United Latin American Citizens* v. *Midland Independent School Dist.*, 812 F.2d 1494, 1500-01 (5th Cir. 1987), *vacated on other grounds*, 829 F.2d 546 (5th Cir. 1987) (political cohesiveness may also be shown by a "share[d] com-

While appellants argued generally that a statewide focus was inappropriate, they made no effort to rebut appellees' evidence of black voter cohesion statewide. Indeed, at trial as part of their evidence of responsiveness, appellants introduced "a long list of measures passed by the General Assembly aimed primarily at helping the black community." J.S. App. 21a. Appellants stipulated to black voter cohesion in southwestern Tennessee.

Moreover, in their brief in support of their motion to alter or amend the judgment of the three-judge court in the consolidated case of *Langsdon* v. *Milsaps*, No. 92-2415 (W.D. Tenn. Sept. 15, 1993),[5] appellants acknowledged that blacks were politically cohesive and that racial bloc voting existed throughout the state. One of appellants' principal arguments in support of their motion was that the *Langsdon* plaintiffs' alternative plan would violate Section 2 "by diluting minority voting strength in a number of areas throughout the State." Brief of Defendants in Support of Motion to Alter or Amend Judgment at 3. One of those areas was Hamilton County, in the eastern Tennessee. *Id.* at 9. Of course, appellants' representation that the Langsdon plaintiffs' proposed plan would violate Section 2 would be without any foundation unless blacks were politically cohesive throughout the state and voting was racially polarized.

Appellants also claimed in support of their motion to alter or amend that the state's plan "avoids the underrepresentation of

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mon experience in past discriminatory practices," as well as "common social, economic, and political interests which converge and make them a cohesive political group").

5. In *Langsdon* v. *Milsaps*, *supra*, the three-judge court declared the state house plan unconstitutional under the equal protection clause of the Fourteenth Amendment. J.S. App. 2a.

the disproportionately undercounted African-American population'' in various parts of the state, including Davidson and Hamilton Counties, neither of which is in the southwest part of the state. *Id.* at 15-16. Again, the very premise of such a claim is the belief that the black population throughout the state is politically cohesive.

In view of the evidence and findings of the three-judge court, appellants are clearly wrong in contending that there was no proof of vote dilution or minority cohesion outside southwest Tennessee.

SUMMARY OF ARGUMENT

The three-judge court did not err in using statewide demographic figures as the measure of undiluted minority voting strength because there was substantial evidence of vote dilution outside southwest Tennessee and proof that African-American voters are politically cohesive on a statewide basis. J.S. 5-6, 8.

The decision below is not in conflict with decisions of other lower courts. Appellees challenged, and appellants defended, the entire Tennessee senate redistricting plan. In such cases, courts have consistently applied a statewide (or jurisdiction-wide) impact analysis. *See, e.g., Jeffers* v. *Clinton*, 730 F. Supp. 196, 198 (E.D. Ark. 1989), *aff'd*, 498 U.S. 965 (1991).

It would make no difference to the outcome of this appeal if the court below had used local, as opposed to statewide, demographic percentages. The measure of undiluted minority voting strength based on voting age population (''VAP'') using west Tennessee percentages would be 2.65—or three—senate seats. Three seats would be the appropriate measure, not because blacks are entitled to proportional representation or to be over-represented, but because senate seats cannot be subdivided. Given the problem of fractional remainders, and laying aside the issue of racial fairness, three would be a statistically more accurate representation of VAP than two seats. *See, United*

States Dept. of Commerce v. *Montana*, 112 S. Ct. 1415, 1420-21 (1992) (discussing the problem of fractional remainders in connection with congressional reapportionment and approving the technique, known as the "method of major fractions," of rounding up or down depending on whether the fractional remainder is greater or less than one-half). Since there are presently only two majority black senate districts in west Tennessee, blacks would be entitled to a third seat as the remedy for the dilution of their voting strength.

The lower court ruled that "only one more majority-black district must be drawn in west Tennessee," and left the location of the district to the discretion of the legislature. J.S. App. 29a. Since appellants are free to draw the additional senate district in Shelby County, as to which they make no claim involving lack of compactness, the issue of whether a compact district can be drawn in rural west Tennessee is academic. In the past this Court has refused to hear cases which lacked "immediacy and reality." *Golden* v. *Zwickler*, 394 U.S. 103, 109 (1969).

The finding of the court below that plaintiffs' proposed redistricting plans were compact and not oddly shaped is not clearly erroneous or based upon errors of law. Appellees' plans were drawn to comply with the one-person, one-vote requirement, to reflect communities of interest, to be contiguous and compact, to comply with state policy of respecting county boundaries, and to avoid diluting minority voting strength.

ARGUMENT

I.
The Court Below Did Not Err in Using Statewide Percentages.

Appellants claim that the three-judge court erred in using statewide figures as the measure of undiluted minority voting strength because there was no evidence of vote dilution outside southwest Tennessee or any proof that African-American

voters are politically cohesive on a statewide basis. J.S. 5-6, 8. Appellants say that this issue is presently pending before the Court in *Johnson* v. *De Grandy*, No. 92-519 (and related cases), and that this Court should note probable jurisdiction or hold this appeal and dispose of it as appropriate in light of its decision in *Johnson* v. *De Grandy*. J.S. 7, 19.

The fatal flaw in appellants' argument is that, as noted above, there is substantial evidence of vote dilution outside southwest Tennessee and substantial proof that African-American voters are politically cohesive on a statewide basis. The identities of the minority groups in *De Grandy* and this case are also dissimilar. In *De Grandy*, the minority class included African-Americans, Cubans, other Hispanics, and a substantial percentage of non-citizens. This case involves a single racial minority that is cohesive statewide. Thus, no matter how the statewide percentages issue in *De Grandy* may be decided, *De Grandy* is factually and fundamentally distinguishable from the instant case.

Appellants also argue that the use of statewide figures would be appropriate only if appellees proved that blacks were geographically compact in every area of the state. J.S. 9. Such an argument fails to grasp the concept of geographic compactness as it is used in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), for a minority *by definition* could never be geographically compact in every area of a state, or a county or a city. The geographic compactness requirement is not intended, as appellants believe, to identify which persons have had their votes diluted, but to determine if dilution is caused by geographic dispersal of the minority population as opposed to the construction of a challenged plan. As the Court held in *Gingles*, "[u]nless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." 478 U.S. at 50 n.17.

Appellants' reliance on the treatment of proportional representation in District 23 in *Gingles* to support their argument, J.S. 10, is also misplaced. In *Gingles*, plaintiffs alleged that the voting strength of blacks in particular multimember districts was diluted because voting was at-large rather than from districts. Plaintiffs did not claim that the boundaries of the districts were drawn in such a way as to dilute minority voting strength, a claim more analogous to the one in this case. As far as District 23 was concerned, the Court found simply that blacks had been consistently proportionately represented and that minority voting strength was not diluted. In addition, because the acceptance or rejection of the challenge to District 23 would not have affected the extent to which blacks were represented statewide, the question whether there was statewide proportional representation was irrelevant.

Appellants are also in error in claiming that the decision in *Nash* v. *Blunt*, 797 F. Supp. 1488 (W.D. Mo. 1992), *aff'd sub nom. African-American Voting Rights Legal Defense Fund, Inc.* v. *Blunt*, 113 S. Ct. 1809 (1993), is in conflict with the decision of the three-judge court in this case. In *Nash* v. *Blunt* the plaintiffs challenged *only* three portions of the 1991 Missouri House of Representatives redistricting plan. 797 F. Supp. at 1492. In this case, appellees challenged, and appellants defended, the entire Tennessee senate redistricting plan.[6]

Appellants' reliance on *Nash* v. *Blunt* is misplaced for the further reason that the statewide percentage language was *dicta*. That case was decided on the ground that plaintiffs had

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6. *NAACP* v. *Austin*, No. 92-CV-72696-DT (E.D. Mich), also relied upon by appellants, J.S. 7, 13, is not in conflict with the decision of the three-judge court for the reason that there has been no decision in that case nor any determination of the statewide percentages issue.

failed to prove legally significant racial bloc voting. 797 F. Supp. at 1506. Moreover, as appellees' motions to dismiss or affirm in *African-American Voting Rights Legal Defense Fund, Inc.* v. *Blunt* make clear, there were several grounds for affirmance that had nothing to do with the merits of the district court's decision, including appellants' failure to include any argument in their jurisdictional statement. *See*, No. 92-1249, Motion of Appellees Blunt and Ashcroft to Dismiss at 18-19. Summary affirmance determines only those issues that were "necessarily decided." *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977).

There is no conflict between the decision of the three-judge court in this case and the decisions of other lower courts. Courts have consistently applied a statewide (or jurisdiction-wide) impact analysis in redistricting cases. *See, e.g., Jeffers* v. *Clinton*, 730 F. Supp. at 198; *Burton* v. *Sheheen*, 793 F. Supp. 1329, 1346 (D.S.C. 1992), *vacated and remanded on other grounds sub nom. Statewide Reapportionment Advisory Committee* v. *Theodore*, 113 S. Ct. 2954 (1993). Nor is there any basis upon which to argue that the judgment below will likely be affected by *De Grandy*. Accordingly, no purpose would be served by full briefing and argument.

II.
The Use of Area Percentages Would Not Affect the Outcome of the Case.

Although the three-judge court used statewide demographic percentages, it would make no difference to the outcome of this appeal if the court had used only the demographic percentages in west Tennessee in determining the level of undiluted minority voting strength. Appellants' argument to the contrary, J.S. 11, is a house of cards based upon the manipulation of figures and disregard for the practical requirements of redistricting.

The total population of Tennessee is 4,877,185. Given a state senate consisting of 33 members, ideal district size would be 147,793. The total population of the seven counties in west Tennessee is 1,033,744. Thus, in conformity with the population based one-person, one-vote standard, west Tennessee would be allotted 6.99—or seven—senate seats (1,033,744 / 147,793 = 6.99).[7]

In the practical world of redistricting, senate seats cannot be subdivided. Fractional remainders must either be disregarded entirely or treated as equal to a whole senator. *See United States Dept. of Commerce* v. *Montana*, 112 S. Ct. at 1419 (discussing the problem of fractional remainders in connection with congressional reapportionment). Under the circumstances, allocating seven seats to west Tennessee would more nearly comply with one person, one vote than allocating only six seats. Under a seven seat configuration for west Tennessee, the deviation from ideal size would be -.08% (1,033,744 / 7 = 147,678 / 147,793 = -.08). Under a six seat configuration, the deviation from ideal size would be + 16.58% (1,033,744 / 6 = 172,291 / 147,793 = + 16.58).

The method of rounding up or down depending on whether the fractional remainder is greater or less than one-half is a commonsense approach. It is known as the "method of major fractions," and is regarded as "a workable solution of the fractional remainder problem" in redistricting. *United States Dept. of Commerce* v. *Montana*, 112 S. Ct. at 1420-21. Although there are other methods of solving the problem of fractional remainders, any method that failed to produce seven senate

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7. Under the existing plan, there are actually eight senate districts that include some portion of the seven counties in west Tennessee. Six of the districts are in Shelby County.

seats in west Tennessee under appellants' hypothetical would violate the one-person, one-vote standard of the Fourteenth Amendment.

For example, if under a six seat plan the non-west Tennessee population were allocated equally to the remaining 27 senate districts, the deviation of each district would be -3.68% (4,877,185 -1,033,744 = 3,843,441 / 27 = 142,350 / 147,793 = -3.68). When this deviation is added to the plus deviation of 16.58%, the total deviation among districts under appellants' hypothetical would be 20.26% (3.68 + 16.58 = 20.26%), a deviation that is unacceptable under the one-person, one-vote requirement. *Mahan* v. *Howell*, 410 U.S. 315, 329 (1973).

Although the state used total population in determining ideal district size and in redistricting the senate, in its Jurisdictional Statement the state used voting age population ("VAP") to make the identical calculations. J.S. 11-2. Since blacks are a smaller percentage of VAP than total population, the only purpose of this arithmetical sleight of hand was to reduce the ideal percentage of seats allocable to west Tennessee (from 7, or 6.99, to 6.76), and to attempt to limit the remedy in this case.

While total population is the standard used in redistricting, the three-judge court held that VAP is the measure under Section 2 for determining a minority's undiluted share of the allocated seats. J.S. App. 19a-20a. Blacks are 37.87% of VAP in west Tennessee. Using appellants' hypothetical, the measure of undiluted minority voting strength based on VAP would be 2.65—or three—senate seats (37.87 x 6.99 = 2.65).[8] Again, three seats would be the appropriate measure, not because

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8. The standard of undiluted minority voting strength based on total population, which appellees contend in their cross-appeal is the proper measure, would be 2.91 (41.61 x 6.99 = 2.91).

blacks are entitled to proportional representation or to be over-represented, but because senate seats cannot be subdivided. Given the problem of fractional remainders, and laying aside the issue of racial fairness, three seats would be a statistically more accurate representation of minority (as well as majority) VAP than two seats.[9]

Since there are presently only two majority-black senate districts in west Tennessee (the third majority black senate district is in Davidson County, which includes the city of Nashville), blacks would be entitled to a third seat in west Tennessee as the remedy for the dilution of their voting strength whether statewide or west Tennessee demographic percentages were used. This appeal does not warrant plenary review.

III.
The Issue of Compactness Is Based Upon Speculative Contingencies and Does Not Warrant Full Review.

Appellees claimed, *inter alia*, that the state's plan "packed" blacks in Shelby County (one of the western counties which includes the city of Memphis) into two majority black districts and that an additional majority black district could have been drawn. They also claimed that the state's plan fragmented blacks in the six rural counties in west Tennessee (Tipton, Lauderdale, Haywood, Madison, Fayette, and Hardeman) and that one majority black district could have been draw in that

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9. The state, moreover, accepted and took into account in its redistricting the census bureau's estimates that "African-Americans were undercounted in the 1990 census by 4.8% while non-blacks were undercounted by 1.7%" Brief of Defendants in Support of Motion to Alter or Amend at 12. The admitted minority undercount, including in Shelby County, adds force to the argument that three seats would be the proper measure of undiluted voting strength if west Tennessee percentages were used.

part of the state. J.S. App. 3a. The three-judge court made a specific finding of vote dilution in "west Tennessee," *i.e.*, in Shelby County and the six rural counties. J.S. App. 28a. However, the court ruled that "only one more majority-black district must be drawn in west Tennessee," and left the location of the district to the discretion of the legislature. J.S. App. 29a.

Appellants do not contest the finding of vote dilution in Shelby County. Instead, they claim that the finding of vote dilution in *rural* west Tennessee was erroneous because appellees failed to draw a compact majority black district in that part of the state in compliance with *Thornburg* v. *Gingles*, *supra*, and *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993). According to appellants, the districts drawn by appellees in rural west Tennessee "were drawn solely on the basis of race, in disregard of all traditional districting principles." J.S. 6.

Since appellants are free to draw the additional senate district required by the three-judge court in Shelby County, as to which appellants make no claim involving lack of compactness, the issue of whether a compact district can be drawn in rural west Tennessee, while not technically moot, is surely academic. Appellants seek essentially an advisory opinion concerning something they are not required to do by the decision of the three-judge court, *i.e.*, draw a majority black district in rural west Tennessee.[10]

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10. In the event the Court notes probable jurisdiction in appellees' cross-appeal, appellants could raise their compactness argument in support of the decision of the three-judge court, *i.e.*, appellants could argue that only one additional senate district located in Shelby County was required because blacks in rural west Tennessee are not compact. Sup. Ct. R. 18.6 ("[t]he Court may permit the appellee to defend a judgment on any ground that the law and record permit and that would not expand the relief granted").

In the past this Court has refused to hear cases based upon "speculative contingencies," *Hall* v. *Beals*, 396 U.S. 45, 49 (1969), or where the issues lacked "immediacy and reality." *Golden* v. *Zwickler*, 394 U.S. at 109. *See also Board of License Comrs.* v. *Pastore*, 469 U.S. 238, 240 (1985). This appeal does not present this Court with a substantial issue concerning compactness that merits plenary review, and should be dismissed or the finding of liability affirmed.

IV.
The Finding of Compactness by the Court Below Is Not Clearly Erroneous.

Appellants' compactness argument was fully considered and squarely rejected by the three-judge court. According to the court, either of plaintiffs' proposed plans "satisfies the first element of *Gingles*." J.S. App. 7a. Whether this finding is viewed as a finding of a subsidiary fact or an ultimate finding of vote dilution, it is reviewable under the clearly erroneous standard of Fed. R. Civ. P. 52(a). *Thornburg* v. *Gingles*, 478 U.S. at 79 ("the clearly-erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution").

That the three-judge court's finding of compactness is not clearly erroneous or based upon errors of law is evident from the record in this case. Appellees drew two senate redistricting plans, each containing two majority-black districts. J.S. App. 4a.[11] The second proposed plan showing the rural majority-black senate district is included in the Jurisdictional Statement Appendix at 36a. As is readily apparent, the district is not even

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11. Appellees submitted the second plan, not because the first was deficient in any way, but to show that a rural senate district could be drawn while splitting only one rural county. Shelby County, because of its size, has to be split in any plan.

remotely similar to the district involved in *Shaw* v. *Reno*. There is no basis for contending that the district is "so bizarre on its face that it is 'unexplainable on grounds other than race.'" 113 S. Ct. at 2825. *Shaw* v. *Reno* is simply inapplicable to this case.[12]

Despite appellants' assertions to the contrary, appellees' plans were drawn in conformity with traditional districting principles. They were drawn to comply with the one-person, one-vote requirement of the equal protection clause of the Fourteenth Amendment. They were drawn to reflect communities of interest, *e.g.* urban/rural. They were drawn to be contiguous and compact.

The districts in appellees' plan are much more compact in terms of land area and distance from end to end than several of the majority-white senate districts contained in the state's plan. Senate District 26, Chapter 826 of the Public Acts of 1992, covers nearly twice the land area of the rural senate district in appellees' second plan. From end to end, appellees' district is 86 miles, compared to about 120 miles for adopted Senate District 26. In addition, adopted Senate Districts 10 and 11 in Hamilton County, which split the city of Chattanooga, are much more irregular in shape than appellees' rural senate district.

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12. Whether the constitutional standard in *Shaw* v. *Reno* is applicable to plans drawn by private plaintiffs to comply with *Gingles*, as opposed to plans implemented by a state legislature, is unclear. Since, as the lower court found, the plans drawn by appellees are "only two of the numerous possible remedies," J.S. App. 24a, and the state has adopted no remedial plan of its own, the consideration of *Shaw* v. *Reno* at this stage of the proceedings is arguably premature. However, assuming arguendo that *Shaw* v. *Reno* is fully applicable, appellees' districts are compact based upon any reasonable definition of the term.

Appellees' districts were also drawn to comply, to the extent possible, with state policy of respecting county boundaries. The rural senate district in appellees' second plan split two counties. However, the plan adopted by the state also split counties in forming senate districts. J.S. App. 24a. Indeed, appellees' second plan split only one more county than did the plan adopted by the state. Under the circumstances, appellants' claim that appellees' plan follows no traditional districting principles and violates "the strong state policy of respecting the integrity of county boundaries" is distinctly misleading. J.S. 14a.

Of course, if there is no way to comply with federal statutory and constitutional law without crossing county lines, then state policy must yield. *Reynolds* v. *Sims*, 377 U.S. 533, 581 (1964). The Tennessee Supreme Court has acknowledged as much. *See*, *Lockert* v. *Crowell*, 631 S.W.2d 702, 714 (Tenn. 1982) (state law requirements are of "secondary import to equal protection requirements").

Appellants' *Shaw* v. *Reno* "compactness and traditional redistricting principles" argument is actually based upon a dual, racially discriminatory standard. According to appellants, majority-white districts of virtually any configuration and construction are acceptable, but more regularly shaped majority black districts drawn to take into account compactness, contiguity, communities of interest, the one-person, one-vote requirement, and respect for county boundaries where possible, are not. To accept such an argument, which is an effort to maintain the status quo and blunt minority political participation, would make a shambles of the Voting Rights Act and the Fourteenth Amendment.

Appellees took race into account, but only as one of many factors, and in doing so they did no more than what was required by the decisions of this Court, the decisions of the Supreme Court of Tennessee, and the policy adopted and applied by the Tennessee legislature. In order to establish a

violation of Section 2, this Court has held that the minority group "must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Thornburg* v. *Gingles*, 478 U.S. at 50. *Gingles* thus *requires* a plaintiff to take race into account in constructing a proposed redistricting plan. It is simply irrational to argue, as do appellants, that appellees erred by following the express directions of this Court. *See also Voinovich* v. *Quilter*, 113 S. Ct. 1149, 1156 (1993) (there is no prohibition on the creation of "majority-minority districts," unless they are shown to violate Section 2").

State policy also requires redistricting plans to take race into account. The Tennessee Supreme Court has held that "[p]rimary consideration must . . . be given to preserving minority [voting] strength." *Lockert* v. *Crowell*, 631 S.W.2d at 714. It would be impossible to do that without considering race in the redistricting process.

In addition, the Chairman of the state Redistricting Committee, Senator Robert Rochelle, advised the members of the committee in a memorandum dated August 26, 1991 that the state's policy in redistricting was to "be sensitive to the racial balance of the districts and the Senate." Pl. Ex. 22. And as appellees have noted *supra*, the state in its briefs in the *Langsdon* case repeatedly indicated that it took race into account in redistricting allegedly to avoid diluting minority voting strength and to correct for the undercount of the African-American population. To the extent that appellees took race into account in drawing proposed redistricting plans, they were not only following the requirements of *Gingles*, but those of state law and practice as well.

The finding of the three-judge court that plaintiff-appellees' proposed black-majority districts in rural west Tennessee are compact is not clearly erroneous, nor based upon errors of law.

CONCLUSION

For the foregoing reasons the appeal should be dismissed on the ground that it is based upon speculative contingencies, or in the alternative, the finding that Tennessee's senate redistricting plan violates Section 2 should be summarily affirmed on the ground that the questions presented are so unsubstantial as not to require further argument.

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